

MAY 22 1976

MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM 1975

No.

75-1693

STANLEY BLACKLEDGE, Warden,

Central Prison, and

STATE OF NORTH CAROLINA,

Petitioners

v.

GARY DARRELL ALLISON,

Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.**

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ATTORNEYS FOR PETITIONERS

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In The
Supreme Court of the United States

OCTOBER TERM 1975

No.

STANLEY BLACKLEDGE, Warden,
Central Prison, and
STATE OF NORTH CAROLINA,
Petitioners

v.

GARY DARRELL ALLISON,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSO-
CIATE JUSTICES OF THE SUPREME COURT OF
THE UNITED STATES:

The petitioners, Stanley Blackledge and the State of North Carolina, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of *Gary Darrell Allison v. Stanley Blackledge, Warden, Central Prison, and the State of North Carolina*, No. 75-1738, filed April 13, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals styled and filed as above is not yet reported but is printed as Appendix E to this petition (pp 23, *post*).

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254 (1) within ninety days of April 13, 1976, the date of entry of the order to be reviewed.

QUESTION PRESENTED

WHETHER THE DISTRICT COURT PROPERLY ACCEPTED A STATE COURT FINDING ON THE VOLUNTARINESS OF ALLISON'S GUILTY PLEA UNDER *TOWNSEND V. SAIN*, 372 US 293 (1963) AND THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT'S EXERCISE OF DISCRETION IN THIS REGARD.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment, the Fourteenth Amendment, 28 USC 2254 and 28 USC 2255.

STATEMENT OF THE CASE

On January 24, 1972 in the Superior Court of Alamance County, North Carolina, Honorable Marvin Blount, Jr., Judge Presiding, Gary Darrell Allison entered a plea of guilty in case number 71 CRS 15073, in which he was charged with attempted safe robbery ("safecracking"). He was represented by counsel, Glenn Pickard, Esquire, at this time. Before Judge Blount accepted this plea, he asked Allison some fourteen questions in accordance with a formalized North Carolina procedure in order to determine whether or not his plea was an intelligent, knowing and voluntary act. These questions are Appendix A to this petition (pp. 10, *post*), and covered the matters of defendant's mental capacity, his understanding of the charge and its penalty, his understanding of the right to plead not guilty and have a jury trial, a canvass of possible motivations for his plea, and a canvass of his ability to prepare a defense. In response to these questions, Allison, under

oath, acknowledged among other things that he was guilty and that he understood he could be imprisoned from 10 years to life as a result of his plea, and stated that no one had made any promise or threat to him to influence him to plead guilty in this case. On the basis of the overall inquiry findings were made, including one that "the plea of guilty by the defendant is freely, understandingly and voluntarily made without undue influence, compulsion or duress and without promise of leniency" and the plea was accepted. Allison was sentenced to imprisonment for a period of from seventeen to twenty years. He did not appeal.

On or about February 15, 1973, after having exhausted state remedies, Allison applied for a writ of habeas corpus from the United States District Court for the Middle District of North Carolina pursuant to 28 USC 2254 alleging that his guilty plea thirteen months earlier to the charge of attempted safe robbery was a result of the following episode:

"The petitioner was led to believe and did believe, by Mr. Pickard, that he, Mr. M. Glenn Pickard, had talked the case over with the Solicitor and the Judge, and that if the petitioner would plea [*sic*] guilty, that he would only get a ten year sentence of penal servitude. This conversation, where the petitioner was assured that if he plea [*sic*] guilty, he would only get ten years was witnessed by another party other than the petitioner and counsel."

See Appendix B (pp. 14, *post*).

In reviewing Allison's application, Honorable Eugene A. Gordon, Judge Presiding, found that the transcript of plea taken by Judge Blount at trial showed a careful examination prior to acceptance of Allison's plea, and impliedly accepted it in lieu of further hearing. He also construed the allegation to be one concerning only a prediction of sentence, rather than an allegation of a broken plea bargain or a misrepresentation about a sentence. Therefore, he dismissed the application

without evidentiary hearing. This order appears as Appendix C (pp. 18, *post*). Allison sought a reconsideration, whereupon Magistrate Herman A. Smith then characterized the allegation as one of "an unkept promise" and entered an order on April 25, 1974, directing Allison to file an affidavit by the witness he had originally mentioned in support of this claim. Instead of doing this, on or about May 13, 1974, Allison sent a letter saying that his witness was unable to get his statement notarized. On or about May 17, 1974, he followed this saying that his mother had written him that the papers had been notarized but were then torn up by the notary. This was interpreted as suggesting state interference with his right to access to the courts by the District Court, for the Clerk then suggested that Allison have his mother swear to this by affidavit and get an unsworn statement from the witness with that statement to include a recitation of his attempts to get his paper notarized. Neither were forthcoming. Instead, two and one-half months later, Allison wrote to the Court complaining of disparity in sentences between him and his co-defendant, and stating he had heard through his people "that the statement my co-defendant was supposed to make was not made because he is afraid of his parole and work release". On August 16, 1974, Judge Gordon again dismissed the application. This order appears as Appendix D (pp. 20, *post*). Allison then obtained and sent an unsworn statement purportedly made and signed by his co-defendant and witnessed by three persons without designation, again seeking reconsideration of the judge's second order. Nothing was said about state interference with his access to the courts in this statement, and he did not send with it an affidavit from his mother. Reconsideration was declined by Judge Gordon and Allison appealed.

On April 13, 1976, after briefing and oral argument, the United States Court of Appeals for the Fourth Circuit reversed the District Court in a decision in which Honorable John A. Field, Jr., Circuit Judge, concurred but criticized the precedents in the Circuit necessitating his concurrence and the course of

decision in the Circuit on this type of case. A motion to rehear *en banc* was made within the Court but failed for a want of a majority. This opinion appears as Appendix E (pp. 23, *post*). Writing for the majority, Honorable Harrison Winter, Circuit Judge, held that Allison was not bound by his at-trial statement that he had not been promised anything for his plea because "he had advanced a reasonable explanation for his inconsistent allegations", *ie.* he had been instructed to answer in the way he did by his lawyer. The majority also held improper the District Court's action in requiring that Allison document his claim with affidavits. On April 21, 1976, a stay of mandate for purpose of seeking certiorari in this Honorable Court was granted on the condition that the petition be filed within thirty days.

REASONS FOR GRANTING THE WRIT

I

THERE IS A CONFLICT IN THE CIRCUITS OVER THE EFFECT TO BE GIVEN RULE 11 AND *BOYKIN V. ALABAMA*, 395 US 238 (1969) TESTIMONY BY AN ACCUSED IN A LATER HABEAS ACTION CONCERNING ALLEGED BROKEN PLEA BARGAINS. THE FOURTH CIRCUIT'S RULE ADVERSELY AFFECTS A SUBSTANTIAL NUMBER OF NORTH CAROLINA CONVICTIONS AND IS IN CONFLICT WITH *MACHRIBRODA V. UNITED STATES*, 368 US 487 1962; *TOWNSEND V. SAIN*, 372 US 293 (1963); AND *FONTANE V. UNITED STATES*, 411 US 213 (1973).

In *Machribroda v. United States*, 368 US 487 (1961) and *Fontane v. United States*, 411 US 213 (1972), this Honorable Court adopted a case-by-case approach to allegations by prisoners that their guilty pleas were the result of unkept promises by government personnel. In the first of these cases, the Court characterized the claim as "marginal" and "close to

the line" but held that because the allegations were specific and detailed and were not belied by the files and records of the case, a further hearing was required by the language of 28 USC §2255. In the latter case, the Court noted as a general proposition that an accused would not be allowed to repudiate his statements at the time of plea, but again because petitioner's claim related in part to his mental competency, and he provided corroborative material, this Honorable Court reversed the denial of a hearing to him. In the intervening years between *Machribroda* and *Fontane*, the first of these decisions produced several divergent lines of authority within the circuits. The Third, Fifth, Sixth and Tenth Circuits generally held that if a Rule 11 inquiry was made at trial and the defendant stated at that time no promises were made to him for his plea, then the files and records are conclusive on the matter under 28 USC §2255 and a habeas corpus hearing is not required, *Norman v. United States*, 368 F2d 645 (3 Cir 1966); *Pursley v. United States*, 391 F2d 224 (5 Cir 1968); *United States v. Davis*, 319 F2d 482 (6 Cir 1963); *Putnam v. United States*, 337 F2d 313 (10 Cir 1964). On the other hand, the First, Second and Ninth Circuits generally held that such Rule 11 statements have evidential value at any later hearing but do not make the files and records conclusive on the matter and therefore these Circuits require a hearing, *United States v. McCarthy*, 433 F2d 591 (1 Cir 1970); *Trotter v. United States*, 352 F2d 419 (2 Cir 1969); *Reed v. United States*, 441 F2d 569 (9 Cir 1971). Three of the remaining circuits apparently opted for a middle course which might be described in terms of a "defeasible conclusive" approach in which a higher threshold for inquiry has been required. However, this requirement of a higher threshold in the Fourth Circuit is an illusory one rather than one of substance.

The Fourth Circuit first dealt with the issue of habeas hearings for allegations concerning broken plea bargains in *Walters v. Harris*, 460 F2d 988 (4 Cir 1972), which decision placed it with the "evidential—not conclusive" group. In that case, the

Court remanded Walters' case for hearing despite a detailed Rule 11 inquiry which had revealed no promises. Later the Fourth Circuit appeared to modify *Walters* in *Crawford v. United States*, 519 F2d 347 (4 Cir 1975) and to move into the middle group. In that case, on the basis of much less of a Rule 11 inquiry than had occurred in *Walters*, the Court held that the allegations of a plea bargain were insufficient to require a hearing, and announced the Circuit's rule to be:

"... that the accuracy and truth of an accused's statements at a Rule 11 proceeding in which his guilty plea is accepted are 'conclusively' established by that proceeding unless and until he makes some reasonable allegation why this should not be so. Stated otherwise . . . a defendant should not be heard to controvert his Rule 11 statements in a subsequent §2255 motion unless he offers a valid reason why he should be permitted to depart from the apparent truth of his earlier statements."

However, in *Edwards v. Garrison*, 529 F2d 1374 (4 Cir 1975), cert. den. ____ US ____ (1976), the Fourth Circuit held that an allegation by a prisoner that he was told to answer untruthfully by his lawyer in order to assure acceptance of the plea bargain was a valid reason to go behind the at-trial statements and would require a hearing by district courts confronted with such allegations. Since this generally accompanies an allegation of a broken plea bargain, *ie.* is a stock corollary to it, it adds nothing to *Walters v. Harris*, *supra*, and in substance, if not form, the Fourth Circuit remains where it was—in the "evidential—not conclusive" group.

Whether or not the above is a proper disposition for §2255 habeas cases, this same view has been erroneously carried over to state cases in the Fourth Circuit in spite of the higher "conclusive" standard applicable to federal habeas review, *cf.* 28 USC §2254, §2255, and in spite of this Court's and Congress' authorization to the district court to accept state court factual findings, *Townsend v. Sain*, 372 US 293 (1963); 28 USC

§ 2254. Therefore, the fact that the Fourth Circuit is on the wrong side of the split in authority in the circuits has led to a situation where all 116,000 guilty pleas rendered in North Carolina from 1967 through 1973 are subject to collateral attack on a new basis, as well as a good part of those 50,000 plus guilty pleas entered from 1974 to the present. This is disheartening because North Carolina began dealing with the problem of plea bargaining by means of a pre-plea, in-court, interrogation under oath well before being required to by *Boykin v. Alabama*, 395 US 238 (1969). More importantly it is extremely disruptive because the sentences for the worst of the crimes committed during the above periods have not yet been served, and even those which have been served retain continued viability for habeas review purposes in the contexts of use for later impeachment, *Loper v. Beto*, 405 US 473 (1972); sentencing, *United States v. Tucker*, 404 US 443 (1972); and other "collateral consequences", *Carafas v. Lavalley*, 391 US 234 (1968). Therefore, it cannot be questioned that the Fourth Circuit's decision has substantial impact in North Carolina.

This Honorable Court has held in *Fontane v. United States*, *supra*, that compliance with Rule 11 "like any procedural mechanism . . . is neither always perfect nor uniformly invulnerable to subsequent challenge . . .". However, if the case law in the Fourth Circuit stands, then it never is, and paradoxically, compliance with Rule 11 and with *Boykin v. Alabama*, *supra*, is worthwhile only where it was unnecessary in the first place.

CONCLUSION

It is respectfully submitted that because of the above, this case is of sufficient importance for the court to exercise its jurisdiction and issue a Writ of Certiorari to review the decision of the United States Court of Appeals, either to summarily reverse it, or to set the matter for briefing and argument.

Respectfully submitted,

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APPENDIX A

STATE OF NORTH CAROLINA

County of Alamance

STATE OF NORTH CAROLINA

vs.

Gary Darrell Allison

File #71CrS 15073

Film # _____

In The General Court of Justice
Superior Court Division

TRANSCRIPT OF PLEA

The Defendant, being first duly sworn, makes the following answers to the questions asked by the Presiding Judge:

1. Are you able to hear and understand my statements and questions? Answer: Yes
2. Are you now under the influence of any alcohol, drugs, narcotics, medicines, or other pills? Answer: No
3. Do you understand that you are charged with the felony of Attempted Safe Cracking? Answer: Yes
4. Has the charge been explained to you, and are you ready for trial? Answer: Yes
5. Do you understand that you have the right to plead not guilty and to be tried by a Jury? Answer: Yes
6. How do you plead to the charge of Attempted Safe Cracking—Guilty, not Guilty, or nolo contendere? Answer: Guilty
7. (a) Are you in fact guilty? (Omit if plea is nolo contendere) Answer: Yes
- (b) (If applicable) Have you had explained to you and do you understand the meaning of a plea of nolo contendere? Answer: _____

8. Do you understand that upon your plea of guilty you could be imprisoned for as much as minimum of 10 years to life? Answer: Yes
 9. Have you had time to subpoena witnesses wanted by you? Answer: Yes
 10. Have you had time to talk and confer with and have you conferred with your lawyer about this case, and are you satisfied with his services? Answer: Yes
 11. Has the Solicitor, or your lawyer, or any policeman, law officer or anyone else made any promises or threat to you to influence you to plead guilty in this case? Answer: No
 12. Do you now freely, understandingly and voluntarily authorize and instruct your lawyer to enter on your behalf a plea of guilty? Answer: Yes
 13. Do you have any questions or any statement to make about what I have just said to you? Answer: No
- I have read or heard read all of the above questions and answers and understand them, and the answers shown are the ones I gave in open Court, and they are true and correct.
- Gary Darrell Allison
Defendant

Sworn to and subscribed before me this 24th day of January, 1972.

Catherine Sykes, Ass't.
Clerk Superior Court

AOC-L Form 158
Rev. 10/69

ADJUDICATION

The undersigned Presiding Judge hereby finds and adjudges:

- I. That the defendant, Gary Darrell Allison, was sworn in open Court and the questions were asked him as set forth in the Transcript of Plea by the undersigned Judge, and the answers given thereto by said defendant are as set forth therein.
- II. That this defendant, was represented by attorney, M. Glenn Pickard, who was (court appointed); and the defendant through his attorney, in open Court, plead (guilty) to Attempted Safe Cracking as charged in the (warrant) (bill of indictment), of Breaking & Entering, Safe Burglary & Possession of Burglary Tools and in open Court, under oath further informs the Court that:
 1. He is and has been fully advised of his rights and the charges against him;
 2. He is and has been fully advised of the maximum punishment for said offense(s) charged, and for the offense(s) to which he pleads guilty;
 3. He is guilty of the offense(s) to which he pleads guilty;
 4. He authorizes his attorney to enter a plea of guilty to said charge(s);
 5. He has had ample time to confer with his attorney, and to subpoena witnesses desired by him;
 6. He is ready for trial;
 7. He is satisfied with the counsel and services of his attorney;

And after further examination by the Court, the Court ascertains, determines and adjudges, that the plea of guilty, by the defendant is freely, understandingly and voluntarily

made, without undue influence, compulsion or duress, and without promise of leniency. It is, therefore, ORDERED that his plea of guilty be entered in the record, and that the Transcript of Plea and Adjudication be filed and recorded.

This 24th day of January, 1972.

Marvin Blount Jr.
Judge Presiding

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GARY DARRELL ALLISON,)	
Petitioner,)	
v.)	PETITION FOR
)	WRIT
DR. STANLEY BLACKLEDGE,)	OF
Warden)	HABEAS CORPUS
Central Prison, Raleigh, N. C. and)	No. C-71-G-73
STATE OF NORTH CAROLINA,)	
Respondent.)	

* * * * *

13. State concisely every ground on which you base your allegation that you are being held in custody unlawfully and in violation of the Constitution or laws of the United States:

- (a) Petitioner contends that his guilty plea was induced by an unkept promise, and therefore was not the free and willing choice of the petitioner, and should be set aside by this Court. An unkept bargain which has induced a guilty plea is grounds for relief. *SANTOBELLO v. NEW YORK*, 404 U.S. 257, 267 (1971).

* * * * *

14. State fully and concisely, and in the same order all available evidence, documentary or otherwise, which you claim will support each of the grounds set out in item (13):

- (a) The petitioner was charged with and brought to trial on the charges of safe robbery, and two (2) counts of breaking, entering and larceny and possession of burglary tools.

The petitioner was led to believe and did believe, by Mr. Pickard, that he Mr. N. Glenn Pickard had talked the case over with the Solicitor and the Judge, and that if the petitioner

would plea [*sic*] guilty, that he would only get a 10 year sentence of penal servitude. This conversation, where the petitioner was assured that if he plea [*sic*] guilty, he would only get ten years was witnessed by another party other than the petitioner and counsel.

That the petitioner had entered pleas of not guilty and the case was called and a recess was called, and it was at this recess, that the petitioner agreed to plead guilty, because he was told that he had to do so, because the jury was going to find him guilty because his co-defendant was going to plead guilty.

The petitioner believing that he was only going to get a ten year active sentence, allowed himself to be pled guilty to the charge of attempted safe robbery, and was shocked by the Court with a 17-21 year sentence. In *MACHRIBRODA v. UNITED STATES*, 368 U.S. 487, [*sic*] it was held that a guilty plea induced by a promise was involuntary.

The petitioner was promised by his Attorney, who had consulted presumably with the Judge and Solicitor, that he was only going to get a ten year sentence, and therefore because of this unkept bargain, he is entitled to relief in this Court. An assurance by another that Petitioner would receive a particular sentence therefore since the trial Judge was the only authority as to the length of sentence, the unkept bargain which induced the guilty plea would invalidate the guilty plea. *SANTOBELLO v. NEW YORK*, SUPRA. [*sic*]

The petitioner is aware of the fact that he was questioned by the trial Judge prior to sentencing, but as he thought he was only going to get ten years, and had been instructed to answer the questions, so that the Court would accept the guilty plea, this fact does not preclude him from raising this matter especially since he was not given the promised sentence by the Court.

It is clear that the United States Supreme Court specifically approved of plea bargaining in SANTOBELLO, SUPRA, and it is equally clear that plea bargaining, when same has been held as in this matter, should appear upon the face of the record. WALTERS v. HARRIS, 460 F. 2d 988 (1972 4th Cir.)

It is clear that the petitioner is entitled to relief in this Court, if in fact, he plead guilty, to the charge of attempted safe robbery, upon the belief that he was only going to receive a ten year sentence. The fact that the Judge, said that he could get more, did not affect, the belief of the petitioner, that he was only going to get a ten year sentence.

It was as said in United States v. Williams, 407 F. 2d 940, 949 n. 13 (4th Cir. 1969):

"... If the Judge, the prosecution, or the defense counsel makes a statement in open court that is contrary to what he has been led to believe, especially as to promises by the prosecutor or his defense counsel, ... (the defendant) would no more challenge the statement in open court than he would challenge a clergyman's sermon from the pulpit."

Because of the above, it is clear that the response given in Court by this petitioner cannot be used as conclusive proof that the guilty pleas [sic] was not induced by a promise that was not kept as contended by the petitioner in this cause, See: REED v. UNITED STATES, 441 F. 2d 569 (9th Cir. 1971); UNITED STATES v. SIMPSON, 436 F. 2d 162 (D.C. Cir. 1970); UNITED STATES v. McCARTHY, 433 F. 2d 591 (1st Cir. 1970); TROTTER v. UNITED STATES, 359 F. 2d 419 (2d Cir. 1966).

WALTERS v. HARRIS, Supra. Pamphlet decision Pages 11-12 says:

"... Surely in the future the United States Supreme Court's approval of plea bargaining, Santobello, Supra, will dispel the doubt about the validity of plea bargain-

ing that has caused plea bargains traditionally to be shrouded in secrecy. "We reiterate what we have said before: That when plea bargaining occurs it ought to be spread on the record and publicly disclosed. 'RAINES, Supra, at 530. (I) f (a plea) was induced by promises, the essence of those promises must in some way be made known' Santobello, Supra at"

The guilty plea to attempted safe robbery and sentence of 17 to 21 years is invalidated and made involuntary by the unkept promises in this cause of only a ten year maximum sentence, and should be set aside and vacated by this Court. 6th, 6th [sic] and 14th Amendments to the Constitution.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

GARY DARRELL ALLISON,)	
Petitioner,)	
v.)	
)	
DR. STANLEY BLACKLEDGE,)	C-71-G-73
Warden, Central Prison,)	
Raleigh, N. C. and STATE)	
OF NORTH CAROLINA,)	
Respondents.)	

MEMORANDUM OPINION AND ORDER

GORDON, Chief Judge

Petitioner is a state prisoner seeking habeas corpus relief. He has been allowed to proceed as a pauper.

Petitioner alleges that his plea of guilty was invalid, that he was not informed of his right to appeal and he has been denied a post-conviction hearing.

The respondents' motion to dismiss will be granted.

Petitioner alleges that counsel "presumably" talked with the Court and solicitor and that counsel told him if he entered a plea of guilty he would get but ten years. Petitioner was sentenced to 17 to 21 years for safe robbery. Petitioner does not otherwise contest the voluntariness of his plea of guilty. A transcript of the plea was furnished with respondents' answer and motion to dismiss and conclusively shows that he was carefully examined by the Court before the plea was accepted. Therefore, it must stand. Predictions of counsel of the duration of a sentence, without more, are not grounds for attacking an otherwise valid plea of guilty. *Swanson v. United States*, 304 F. 2d 865 (8th Cir. 1962).

After the entry of a valid plea of guilty, there is no duty of counsel to inform a defendant of his right to appeal. *Songer v. Coiner*, mem. dec., No. 14,818 (4th Cir., November 4, 1971); *LeDoux v. Peyton*, mem. dec., No. 13,599 (4th Cir., April 25, 1972).

There is no constitutional right to a post-conviction hearing. A post-conviction hearing pertains only to the exhaustion of state remedies. *Robinson v. Blackledge*, mem. dec., No. 71-1124 (4th Cir., September 10, 1971); *Noble v. Sigler*, 351 F. 2d 673 (8th Cir. 1965).

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the application for writ of habeas corpus of Gary Darrell Allison, filed February 15, 1973, be and is hereby denied and the action dismissed.

In accordance with this Court's liberal policy relative to the filing of actions in forma pauperis, 28 U.S.C. § 1915, and in accordance with the intent of Rule 24, Federal Rules of Appellate Procedure, if the petitioner desires to do so, permission to appeal in forma pauperis is hereby granted.

IT IS FURTHER ORDERED that the Clerk mail a certified copy of this Memorandum Opinion and Order to the petitioner at his place of confinement and two certified copies to the Attorney General of the State of North Carolina.

Eugene A. Gordon
United States District Judge

August 27, 1973

A True Copy

Teste:

Carmon J. Stuart, Clerk

By: Patricia F. Kimball

Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

GARY DARRELL ALLISON,)
 Petitioner,)
 v.)
 DR. STANLEY BLACKLEDGE,)
 Warden, Central Prison,)
 Raleigh, N. C. and STATE)
 OF NORTH CAROLINA,)
 Respondents.)

C-71-G-73

ORDER

GORDON, Chief Judge

This action was referred to United States Magistrate, Herman Amasa Smith, for preliminary review pursuant to the provisions of 28 U.S.C. § 636 (b) and Local Rule 50, Rules of Practice and Procedure. The Magistrate has submitted to the Court a Memorandum and Recommendation.

The Court has examined the files and records of the action and has independently determined that the petition is without merit, and that the relief sought should be denied for the reasons appearing in the Magistrate's Memorandum and Recommendation, which is attached and made a part of this Order.

IT IS HEREBY ORDERED that the petition for rehearing of Gary Darrell Allison, filed September 4, 1973, be and is hereby denied and the action dismissed.

In accordance with this Court's liberal policy relative to the filing of actions in forma pauperis, 28 U.S.C. § 1915, and in accordance with the intent of Rule 24, Federal Rules of Appellate Procedure, if the petitioner desires to do so, permission to appeal in forma pauperis is hereby granted.

IT IS FURTHER ORDERED that the Clerk mail a certified copy of this Order to the petitioner at his place of confinement and two certified copies to the Attorney General of the State of North Carolina.

Eugene A. Gordon
United States District Judge

August 16, 1974

A True Copy

Teste:

Carmon J. Stuart, Clerk

By: Patricia F. Kimball
Deputy Clerk

C-71-G-78

**MAGISTRATE'S MEMORANDUM AND
RECOMMENDATION**

Gary Darrell Allison

By Memorandum Opinion and Order entered 28 August 1973, this Court dismissed petitioner's application for a writ of habeas corpus. On September 4, 1973, petitioner, with the aid of a writ room clerk, filed a petition for a rehearing. That petition sought to bring petitioner's plea of guilty within the ambit of *Santobello v. New York*, 404 U. S. 257 (1971). The petitioner claimed that he had witnesses to prove that plea bargaining took place and that the bargain was not kept. On April 29, 1974, a Memorandum Order was entered directing him to file within 30 days from the date of the entry of the Order affidavits of his witnesses with such proof of his allegations as he might be able to muster. The respondents were then allowed to file counter affidavits within 21 days after the receipt of the petitioner's affidavits.

On May 13, 1974, the petitioner addressed a letter to Chief Judge Eugene Gordon which alleged that his codefendant who had a statement to make for the Court was unable to have it notarized. A copy of that letter was sent to the respondents by letter dated May 16, 1974. The respondents wrote the

Court on May 20, 1974, a copy of which was sent to Allison, informing him that the superintendent of the Graham Unit was a notary public and that his witnesses might appear before him to execute any affidavits. Subsequently, on May 17, 1974, the petitioner wrote Judge Gordon again. He wrote that he had received a letter from his mother indicating that the papers had been notarized but were destroyed by the notary public. In response to that charge, May 22, 1974, our Clerk of Court, Carmon J. Stuart, Esquire, was directed to write Mr. Allison. That letter suggested that Allison submit to the Court an affidavit of his mother, or anyone else who had first-hand knowledge of the fact, that a notarized statement in Allison's behalf was destroyed, giving the name of the person who destroyed it and describing the circumstances. Mr. Stuart also suggested that if Allison's codefendant was willing to make a statement and was unable to get it notarized that he document his efforts and send it to the Court. No further communication was received from the petitioner until 6 August 1974 when he wrote complaining of the disparity of sentences given him and his codefendant.

It is submitted that *Santobello, supra.*, stands for the proposition that when a petitioner furnishes evidence that plea bargaining has taken place *and* that promises made to induce his plea were not kept, the Court must go behind the transcript of his plea of guilty, regardless of the inconsistency existing between his in-court declarations under oath and his subsequent statements.

It is submitted that Allison has been given ample opportunity to support his allegations of plea bargaining and to show that his plea was involuntarily induced by an unkept promise. Having failed in this regard, IT IS RECOMMENDED that an Order be entered dismissing his petition for rehearing.

Herman Amasa Smith
United States Magistrate

14 August 1974

APPENDIX E
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1738

Gary Darrell Allison,

Appellant,

v.

Stanley Blackledge, Warden, Central Prison,
and State of North Carolina,

Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, Chief Judge.

Argued December 2, 1975

Decided April 13, 1976

Before HAYNSWORTH, Chief Judge, and WINTER and FIELD, Circuit Judges.

C. Frank Goldsmith, Jr. [court-appointed counsel], (Story, Hunter, and Goldsmith, on brief) for Appellant; Richard N. League, Assistant Attorney General of North Carolina, and (Rufus L. Edmisten, Attorney General of North Carolina, on brief) for Appellees.

WINTER, Circuit Judge:

Gary Darrell Allison, a North Carolina prisoner incarcerated under state law, appeals from the summary denial of his petition for a writ of habeas corpus. He sought issuance of the writ on the ground, *inter alia*, that his plea of guilty to attempted safe robbery was involuntary. Because we are persuaded that Allison sufficiently alleged a claim of involuntari-

ness, we reverse the order denying issuance of the writ and remand the case for further proceedings.

I.

In Allison's petition for a writ of habeas corpus, he alleged, with regard to the claim that his plea was involuntary, that he was brought to trial on charges of (a) safe robbery, (b) breaking, entering and larceny, and (c) possession of burglary tools. During a recess of the trial, Allison was led to believe by his counsel that counsel

had talked the case over with the Solicitor and the Judge, and that if the petitioner would plead guilty, that he would only get a 10 year sentence of penal servitude.

He alleged further that his conversation with his lawyer was "witnessed" by another person other than Allison and his lawyer, that he entered a plea of guilty to attempted safe robbery because he believed that he would receive only a ten-year sentence, but that after his plea was accepted he was sentenced to a term of seventeen to twenty-one years. In supplementation of his claim, Allison said that he had been "promised by his Attorney, *who had consulted presumably with the Judge and Solicitor*, that he was only going to get a ten year sentence . . . (emphasis in original)." He conceded that he was questioned by the trial judge prior to sentencing, and, by implication, that in his answers he denied that any promises had been made to him; but since he thought "he was only going to get ten years, and had been instructed to answer the questions so that the Court would accept the guilty plea," he was not now precluded from attacking its voluntariness.

In answer, the state asserted that the plea was voluntary. It filed the transcript of Allison's plea—a printed form setting forth certain questions with Allison's written answers, signature and verification. The question of whether Allison's lawyer had made any promise or threat to induce the plea was answered

negatively; and the question of whether Allison's plea was freely, understandingly and voluntarily made was answered affirmatively.

The district court dismissed Allison's petition summarily. It was of the view that the transcript of plea showed that the plea was made voluntarily. Referring to the allegation that Allison's lawyer "presumably" talked to the court and the prosecutor, the district court held that predictions of counsel as to the duration of a sentence provided no ground for attacking an otherwise valid plea of guilty.

Allison then filed a petition for rehearing. In essence, he argued that an unkept promise of counsel could render a guilty plea involuntary and that he was entitled to an evidentiary hearing to afford him the opportunity to prove that such a promise had been made to him. The petition for rehearing was referred to a magistrate who entered a memorandum order reciting that the burden was on Allison to prove that he was the victim of an unkept promise and directing Allison to file "an affidavit of his witness, and such other proof of his allegation with respect to the promise he maintains was not kept."

Apparently Allison experienced substantial difficulties in trying to comply with the magistrate's order. They need not be detailed, nor their sufficiency or accuracy examined. The fact is that the affidavit and other proof were not forthcoming, and the district court denied the petition for rehearing and dismissed the action for noncompliance.

II.

Taken in their entirety, Allison's allegations are that he was induced to plead guilty by his attorney's promise, which he was led to believe was made after consultation with the prosecutor and the judge, that he would receive a sentence of not more than ten years. That promise, if made, was not kept; and if the promise can be proved, Allison's plea was not

voluntary. *Machriroda v. United States*, 368 U.S. 487 (1962). Of course, in *Machriroda* the promise was made by the prosecutor, but *Machriroda* has been extended to the representations by an accused's counsel that, by prearrangement with the prosecutor or the court, a plea of guilty will not result in greater than a given punishment when, in fact, a greater punishment is imposed. *United States v. Hawthorne*, 502 F. 2d 1183 (3 Cir. 1974); *United States v. Valenciano*, 495 F. 2d 585 (3 Cir. 1974); *Roberts v. United States*, 486 F. 2d 980 (5 Cir. 1973); *Walters v. Harris*, 460 F. 2d 988 (4 Cir. 1972) (by implication), cert. den., 409 U.S. 1129 (1973). Such a representation is far different from a mere prediction by counsel as to the length of sentence which is likely to result from a guilty plea.

Although Allison alleged an unkept promise or representation of his attorney, at the time he pleaded he represented that his attorney had made no promises or inducements to get him to plead and that his plea was voluntary. Ordinarily Allison would be held to his statement at the time he entered his plea unless he advanced a reasonable explanation for his inconsistent allegations. *Crawford v. United States*, 519 F. 2d 347 (4 Cir. 1975). Such an explanation is advanced here. Allison alleges that he answered as he did when he entered his plea because he had been instructed so to answer in order for the trial court to accept his guilty plea. Allison is therefore not foreclosed by the statements he made in order to effect acceptance of his plea from subsequently attacking its voluntariness. *Edwards v. Garrison*, _____ F. 2d _____ (4 Cir., October 13, 1975).

We hold therefore that the district court erroneously denied Allison's petition for a writ of habeas corpus and reconsideration of its denial without conducting an evidentiary hearing to determine the truth of what Allison alleged—both that a promise inducing the plea was made, and that its existence was concealed to effect acceptance of the plea.

III.

We are constrained to add a further word about the procedure followed in the disposition of this case with regard to the magistrate's order that Allison file an affidavit and proof of his allegations before his petition for reconsideration would be decided on its merits, and the district court's denial of the petition for reconsideration and dismissal of the action for failure to comply with the magistrate's order.

Where, as here, an indigent prisoner, proceeding *pro se*, alleges a cause of action which, if proved, would entitle him to post-conviction relief, we think it improper to require him to document that claim or support it by affidavits of his witnesses before affording him the evidentiary hearing to which he is otherwise entitled. *Bryan v. United States*, 492 F. 2d 775, 783 (5 Cir.) (dissenting opinion), cert. denied, 419 U.S. 1079 (1974). Of course we do not hold that the summary judgment procedure of Rule 56, F.R. Civ. P., is inapplicable to applications for writs of habeas corpus by state prisoners. If the state moves for summary judgment in such a case and offers affidavits and other proof that the petitioner's claim is lacking in merit, a *pro se* petitioner may be required, after being advised of his rights and how to proceed, to offer counter affidavits or other proof to establish that material facts are genuinely disputed before he is afforded an evidentiary hearing. If, in such a situation, the petitioner fails to respond and offers no reasonable explanation why he cannot respond, summary judgment may properly be entered against him. But the point is that a *pro se* petitioner is not to be put to a greater burden to obtain an evidentiary hearing when he has alleged a case which, if proved, would entitle him to relief than any other plaintiff in any other type of action.

REVERSED AND REMANDED.

ADDENDUM

After circulation of the majority opinion and the special

concurrence to the nonsitting members of the court, a motion was made within the court to rehear the case in banc and a poll on the motion was requested. The motion failed for want of a majority of those eligible to vote in the poll.

FIELD, Circuit Judge, concurring specially:

I concede, albeit reluctantly, that recognition of *Edwards v. Garrison*, _____ F. 2d _____ (No. 74-1791, 4 Cir. October 13, 1975), as viable precedent supports the reversal in this case. It occurs to me, however, that over the past few years this court has written a "Looking-glass book"¹ in this area.

It began with the decision in *Walters v. Harris*, 460 F. 2d 988 (4 Cir. 1972). In that case a federal defendant filed a § 2255 motion alleging that he had entered his guilty plea upon the promise of a government attorney that he would receive a sentence which was lighter than that ultimately imposed by the court. Although the record disclosed that the defendant had assured the court that no promise had been made to induce his guilty plea, the panel stated "that the defendant's responses alone to a general Rule 11 inquiry cannot be considered conclusive evidence that no bargain occurred," 460 F. 2d at 993, and remanded the case to the district court for an evidentiary hearing. Conceding that its conclusion placed us in conflict with at least four other circuits,² the panel held that the charge of involuntariness was not refuted by the defendant's denial at arraignment that any promise had induced his plea.

Two years after *Harris* we again had occasion to consider this question in *Crawford v. United States*, 519 F. 2d 347 (4

1. "Why, it's a Looking-glass book, of course! And, if I hold it up to a glass, the words will all go the right way again."

The Annotated Alice—Alice in Wonderland and Through the Looking Glass by Lewis Carroll—p. 191, Bramwall House, 1960.

2. *Pursley v. United States*, 391 F. 2d 224 (5 Cir. 1968); *Norman v. United States*, 368 F. 2d 645 (3 Cir. 1966); *Putnum v. United States*, 337 F. 2d 313 (10 Cir. 1964); *United States v. Davis*, 319 F. 2d 482 (6 Cir. 1963).

Cir. 1975). In that case we affirmed the district court's dismissal of the § 2255 motion, stating:

"Accordingly, we adopt the rule that the accuracy and truth of an accused's statements at a Rule 11 proceeding in which his guilty plea is accepted are 'conclusively' established by that proceeding unless and until he makes some reasonable allegation why this should not be so. Stated otherwise, we hold that a defendant should not be heard to controvert his Rule 11 statements in a subsequent § 2255 motion unless he offers a valid reason why he should be permitted to depart from the apparent truth of his earlier statement." 519 F. 2d, at 350.

This encouraging pronouncement in *Crawford* was short-lived for less than three months later we handed down our decision in the consolidated cases of *Edwards v. Garrison*, (No. 74-1791) and *Bass v. United States* (No. 74-2038), *pub. sub nom Edwards v. Garrison*, _____ F. 2d _____.

Edwards involved a state prisoner who charged that his guilty plea was induced by a promise made by his counsel with respect to the sentence he would receive despite the fact that he had affirmed to the court that no promises had been made. The panel held that an evidentiary hearing was required on the issue of voluntariness and, referring to the decision in *Walters v. Harris*, *supra*, stated:

"Although Walters was a federal prisoner prosecuted in a federal court and Edwards is a state prisoner prosecuted in a state court, the same reasoning applies. In either case the unallayed apprehensions of the accused make general inquiries about inducements unreliable in unearthing plea bargains. Not having been asked if he claimed that a plea bargain had been made, Edwards' denial, at the time he entered his plea, that any promise had induced him to tender it does not foreclose inquiry into his later allegation suggesting

that a plea bargain may have been made." _____ F. 2d, at _____.

The opinion in *Edwards* concluded with the observation that the decision was of limited precedential significance since the court had been advised that the state practice had been amended to pose "questions to the prosecutor, the accused, and his lawyer designed to elicit a full disclosure of any plea negotiations and any bargain that was reached." _____ F. 2d at _____.

Any conclusion that specific inquiry relative to a possible plea bargain might be the touchstone to finality in such a case was quickly dissipated, however, by the panel's disposition of the *Bass* case in the same opinion. In *Bass*, the record disclosed that prior to accepting the guilty plea the district judge had advised the defendant that the Supreme Court had approved the practice of plea bargaining, that a plea bargain was proper and that if any bargains had been made Bass "should have no hesitancy" in revealing such information to the court. In response to the court's inquiry, the attorney for Bass stated that in return for the guilty plea the government had promised to recommend a three year sentence. The district court went on to explain that it would not be bound by the government's recommendation and could in fact impose whatever sentence it felt would be necessary up to the statutory maximum. Bass stated that he understood this fact and persisted in his plea. Despite these representations to the court, in his § 2255 motion Bass alleged that the prosecutor and his lawyer assured him that the government's recommendation would be binding on the court and that his lawyer advised him to suppress his truthful answer that he did not wish to plead guilty if the district court would not treat the government's recommended sentence as binding on it. The panel held that despite the thorough inquiry of the district court with respect to a possible plea bargain, Bass "may now be heard to controvert those statements and to seek to establish that he gave those answers solely on the advice of his lawyer to the end that his plea was

not voluntarily and understandingly made and should be stricken." _____ F. 2d, at _____.

A distillation of these decisions demonstrates to me that no matter how searching the inquiry of the court may be on the issue of voluntariness, no trial judge, state or federal, can protect himself against a later complaint by a convicted criminal that his plea was voluntarily entered by reason of some covert promise or understanding dehors the record. It is disturbing to note that all too often the convicted petitioner in such a case alleges that he was advised by his attorney to give false answers to the questions propounded by the court, and our opinions have unfortunately recognized such a charge as a valid allegation which can only be resolved by an evidentiary hearing.³ I suggest that the dignity and weight which we accord such irresponsible allegations is utterly unrealistic, for to me it is inconceivable that any attorney in his right mind would jeopardize his professional reputation and his license to practice law by engaging in such conduct.⁴

Additionally, in many cases presently coming before this court from state prisoners, the petitioner has vouched not only orally, but has confirmed in writing under oath that no improper influence or promise has accounted for his plea. Nevertheless, merely on the prisoner's allegations, we permit the solemn record and act of the trial court to be impugned.

3. In distinguishing the *Bass* case from the earlier decision in *Crawford*, the *Edwards* panel stated:

"In suggesting reasons why in unusual cases a federal prisoner should be permitted to controvert his statements at arraignment, we said '[h]e may have been advised to give answers that the court would require in order to accept the plea, rather than those which reflected the truth.' _____ F. 2d at _____. Bass has alleged just that. It follows that he must be given the opportunity to prove his allegations in a plenary hearing." (Emphasis added), _____ F. 2d, at _____.

4. It is significant that in a great number of these cases the attorney charged with such conduct was performing a public service to the court by acting as appointed counsel for the defendant.

Stripped of all euphemism, the plain truth is that these petitioners either lied to the trial judge at the time they entered their guilty pleas, or they are later lying to the federal court in an attempt to overthrow their convictions. I can discern no middle ground, and in effect we reward them for this self-admitted mendacity by ordering an evidentiary hearing.

I do not believe I am alone in the observation that the once Great Writ has been badly abused in the federal courts over the past decade, and I fear that we have unwittingly encouraged such abuse by our decisions in cases such as this.